a

RE ARUL DAS MICHALE, EX P MALAYAN BANKING BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[BANKRUPTCY NO: D2-29-1722-1998]
16 OCTOBER 2000

b

BANKRUPTCY: *Petition - Creditor's petition - Validity - Registrar issued petition when petition did not have verifying affidavit - Whether petition and subsequent proceedings rendered a nullity - Whether subsequent filing of verifying affidavit cured defect*

c

CIVIL PROCEDURE: *Jurisdiction - Registrar - Registrar issued creditor's petition when petition did not have verifying affidavit - Whether registrar had jurisdiction to issue petition*

d

The court registry, by way of a note to the judgment creditor ('JC'), rejected the creditor's petition ('the petition') on the basis that there was no verifying affidavit. The JC, however, proceeded to file the verifying affidavit and the court registry returned copies of the petition together with the verifying affidavit thereafter. The Senior Assistant Registrar ('SAR') then made receiving and adjudicating orders against the judgment debtor ('JD'). The JD now appealed against the said orders.

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The JD submitted that the SAR had issued the petition in the absence of the verifying affidavit. Thus, the petition and all subsequent proceedings were a nullity. The JD referred to the case of *Loo Cheng Liang v. Ban Hin Lee Bank Bhd* in support of his submission.

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Held:

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[1] In *Loo Cheng Liang*, the creditor's petition and the subsequent proceedings were held to be a nullity on the basis that the registrar had no jurisdiction to issue the said petition when it did not have a verifying affidavit. It did not matter that the verifying affidavit was filed subsequent to the issue of the petition.

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[2] The rejection note from the court registry was consistent with the ruling in *Loo Cheng Liang*. What transpired subsequently had no legal significance. Thus, the petition herein was a nullity.

[Appeal allowed.]

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Case(s) referred to:

Ex Parte Malayan Banking Bhd [1992] 1 CLJ 450 ***(dist)***

Loo Cheng Liang v. Ban Hin Lee Bank Bhd [1992] 2 CLJ 1219 ***(foll)***

Re Mohd Sharif Sapie, ex p Re Ho Weng Keong [1992] 3 CLJ 1744 ***(dist)***

Re Ong Ka Tiam, ex p Hong Leong Bank Berhad [Kebankrapan No. D2-29-152-95] ***(refd)***

Re Tan Hwee Earn, ex p The People's Insurance Company (M) Sdn Bhd [1999] 4 CLJ 325 ***(dist)***

Sobri Arshad v. Associated Tractors Sdn. Bhd. [1991] 1 CLJ 798 ***(dist)***

For the judgment creditors - Quek Cheng Chui; M/s Abdul Rahman & Assoc

For the judgment debtors - Thaiyub Khan; M/s Chelva R Suppiah & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad J:

The creditors' petition in this case, dated 30 November 1998, was presented on 7 December 1998 without a verifying affidavit and was sealed and signed by the senior assistant registrar on the same date, 12 May 1999 being given as the date of hearing.

During submission in this appeal, learned counsel for the judgment creditors showed me a note dated 28 December 1998 from the court registry, a copy of which is not in the court file, informing the judgment creditors' solicitors of the rejection of the creditor's petition for the reason of absence of the verifying affidavit. The note was apparently according to the solicitors' acknowledgment stamped on it, received by the solicitors on 11 January 1999.

Although the note from the court registry conveyed the information that the petition was rejected, the solicitors nonetheless, on 16 January 1999, filed a verifying affidavit, which had been affirmed on 11 January 1999, the very date on which the note from the court registry was apparently received.

According to learned counsel for the judgment creditors, subsequently their solicitors received back from the court registry the solicitors' copies of the petition that had been signed and sealed on 7 December 1998 together with the verifying affidavit.

The learned Senior Assistant Registrar made receiving and adjudication orders against the judgment debtor, from which he now appeals.

The only ground relied on in this appeal by the judgment debtor is that afforded by *Loo Cheng Liang v. Ban Hin Lee Bank Bhd* [1992] 2 CLJ 1219. In that case, the Registrar purported to issue the creditor's petition at a time when there was no verifying affidavit, but the verifying affidavit was filed subsequently. It was decided that, verification of a creditor's petition being a mandatory condition precedent to its issue, the Registrar, in issuing the creditor's petition when there was no verifying affidavit, had acted without jurisdiction, and consequently the petition and all subsequent proceedings were a nullity. Learned counsel for the judgment debtor submitted that the creditor's petition in this case was issued on 7 December 1998 when it was signed and sealed by the Senior Assistant Registrar and that since on that date there was no verifying affidavit, then, according to that case, the petition and all subsequent proceedings were a nullity.

In *Re Ong Ka Tiam, ex p Hong Leong Bank Berhad* [Kebankrapan No. D2-29-152-95] (unreported), which I decided on 24 October 1997, after ruling that the verifying affidavit in that case was a nullity, which was the principal issue in that case, and that therefore when the creditor's petition was issued it was unverified by affidavit, I applied *Loo Cheng Liang* in the absence of argument by learned counsel for the judgment creditors that it should not be followed or applied. I held that the petition was a nullity.

In the present case, as I understand his submission, learned counsel for the judgment creditors did attempt to persuade me not to follow *Loo Cheng Liang* and the attempt was made by citing several cases, but most of them, namely, *Sobri Arshad v. Associated Tractors Sdn. Bhd.* [1991] 1 CLJ 798, *Re Mohd Sharif Sapie, ex p Re Ho Weng Keong* [1992] 3 CLJ 1744 and *Ex Parte Malayan Banking Bhd* [1992] 1 CLJ 450, were cases in which the petition and the verifying affidavit were filed at the same time but the affidavit was affirmed before the date of the filing of the petition and the question was whether the affidavit or the petition was valid by reason of the affidavit being affirmed before the petition was presented. The focus in those cases was on the question of the validity of the verifying affidavit that arose because it was affirmed before the petition was presented. In *Sobri Arshad* it was held that the affidavit was a nullity and so the petition was not verified and was therefore invalid for that reason. In the other cases it was held otherwise. In *Loo Cheng Liang*, however, the petition and the subsequent proceedings were held to be a nullity not for the reason that there was no verifying affidavit – there was, although filed subsequent to the issuance of the petition – but they were held to be a nullity because there being no verifying affidavit when the petition was issued, the registrar had no jurisdiction to issue it when he did. It was a point of absence of jurisdiction in the registrar, which point did not arise and was not an issue in the cases cited.

Another case was cited by learned counsel for the judgment creditors, *Re Tan Hwee Earn, ex p The People's Insurance Company (M) Sdn Bhd* [1999] 4 CLJ 325, but it was cited for the decision on the question whether a creditor's petition has to be served together with the verifying affidavit, which question is totally irrelevant in the present case and irrelevant in the consideration of the correctness of the law in *Loo Cheng Liang*.

I have therefore not been shown any reason why *Loo Cheng Liang* should not be followed.

Learned counsel for the judgment creditors, however, also submitted that *Loo Cheng Liang* ought not to be applied in the circumstances of this case. His reason was that whereas in *Loo Cheng Liang* the creditor's petition was issued when there was no verifying affidavit, in the present case there was a verifying affidavit when the Senior Assistant Registrar issued the petition. He was referring to the fact that after the filing of the verifying affidavit the judgment creditors' solicitors received back from the court registry their copies of the petition, duly signed and sealed, together with copies of the verifying affidavit. Clearly, learned counsel considered that the petition was issued when copies of it were physically sent out of the court registry. In my opinion, since the decision in *Loo Cheng Liang* rested on jurisdiction, that is the jurisdiction of the Registrar to do a legal act, and since the only legal act that the Registrar could have done in the matter of issuing the petition was the signing and the sealing of it, the issuing of the petition by the Registrar intended by *Loo Cheng Liang* was his act of signing and sealing the petition, which was done when the petition did not have a verifying affidavit. In the present case too, the Senior Assistant Registrar issued the petition when he signed and sealed it, which was on 7 December 1998, when there was no verifying affidavit.

Learned counsel for the judgment creditors also argued that the fact that their solicitors received back copies of the petition from the court registry together with the verifying affidavit meant that the petition was in order and was not rejected. The rejection note from the court registry of 28 December 1998 was consistent with the ruling in *Loo Cheng Liang*. It is not clear why, after the petition was rejected by way of the rejection note, the judgment creditors' solicitors went on to file the verifying affidavit and the Court Registry returned the solicitors' copies of the petition and affidavit. Learned counsel for the judgment creditors did not know exactly what happened. What he said about it suggested that it was the result of someone from the solicitors' office speaking with someone in the court registry. In the circumstances, it is not possible to conclude, in the face of the earlier rejection of the petition, that

what transpired subsequently has any legal significance affecting the question of the validity of the petition.

Following and applying *Loo Cheng Liang*, I hold that the petition was a nullity. I accordingly allow the appeal with costs and set aside the receiving and adjudication orders made by the learned Senior Assistant Registrar.